IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE REFERENCE TO DEFENSE COUNSEL'S ARGUMENT TO THE COURT

Defendants respectfully move in limine to exclude any reference by Plaintiffs at trial to defense counsel's opening statements at the February 19, 2008 Preliminary Injunction hearing, which is not evidence in this matter.

BACKGROUND

During opening statements at the February 19, 2008 Preliminary Injunction hearing, defense counsel Patrick Ryan made the following statement:

> And I don't think there's any question but that there has been an overapplication of litter on some or many farms. That's not an issue in our book.

Preliminary Injunction Transcript ("P.I.T.") at 46:15-17 (Feb. 19, 2008, Vol. I) (Ex. A). In closing arguments, Plaintiffs' counsel referred to Mr. Ryan's statement as an "admission by the defendants" that poultry litter has been over-applied in violation of the law, which is not what Mr. Ryan said. *See* P.I.T. at 14:2-4 (Mar. 12, 2008) ("[W]e also have the admission by the defendants in their opening that there has been an over-application of poultry waste with respect to phosphorous.") (Ex. A). As defense counsel explained during Defendants' closing statement, Mr. Ryan's statement was not an admission that poultry litter has been over-applied in violation

of state or federal law. *See* P.I.T. at 32:23-33:12 (Mar. 12, 2008) (Ex. A). Instead, Mr. Ryan's statement merely addressed Plaintiffs' argument that a farmer over-applies poultry litter even if he faithfully follows the litter-application rates specified in the nutrient management plans issued by the State. *See id*. As this Court knows, Plaintiffs took the position in the preliminary injunction hearing that any application of phosphorus in excess of the "agronomic rate" (meaning the amount of phosphorus that plants can quickly absorb) is "waste disposal," even though the State of Oklahoma and the State of Arkansas routinely issue nutrient management plans that tell farmers they can apply poultry litter to specific fields in excess of the agronomic rate. In full, defense counsel stated:

> I want to address something that [Plaintiffs' counsel] said with regard to what I think he interpreted as an admission in opening related to what he referred to as over-application of phosphorus. I just want to make sure the record is clear. What Mr. Ryan said during opening was that *to the extent applying phosphorus above the agronomic rate of phosphorus is over-application, that has occurred in this watershed*. And the reason for that, Your Honor, is very simple. The plans issued by the State of Oklahoma permit that to occur. In fact, they direct growers in terms of where they can land apply and the amounts. And those plans are not based on a strict agronomic rate. So I want to make sure there's no confusion in the record in terms of what was said.

Id. (emphasis added).

Throughout the Preliminary Injunction hearing and in subsequent filings with the Court, Defendants have vehemently disputed Plaintiffs' allegations that overapplication of poultry litter has occurred in violation of the law. *See, e.g.*, Dkt. No. 2199 at 18-19 ¶39 (disputing alleged "undisputed fact" that "poultry waste has been over applied in the IRW"); Dkt. No. 2057 at 17-22 (May 18, 2009) (poultry litter is applied in the IRW at rates authorized by Oklahoma and Arkansas law); Dkt. No. 2254 at 1-7 (June 19, 2009) (same). That is a central issue in this case.

Although the statements of counsel in argument are not evidence, Plaintiffs have repeatedly attempted to introduce Mr. Ryan's statement as evidence that overapplication of

poultry litter in the IRW has in fact occurred in violation of the law. *See, e.g.*, Dkt. No. 2062 at 18 ¶39 ("Poultry waste has been over applied in the IRW. *See* [Dkt. No. 2062] Ex. 61 (Ryan P.I. Opening., p. 46)). On the basis of Plaintiffs' prior filings, Defendants anticipate that Plaintiffs will again attempt to introduce Mr. Ryan's statement at trial as evidence or as a purported admission that overapplication has occurred in violation of the law.

ARGUMENT

Any reference to Mr. Ryan's statements should be excluded under Federal Rules of Evidence 402 and 403. As an initial matter, it is well-established that the statements of counsel in opening arguments do not constitute evidence that may be considered by the trier of fact. Further, Plaintiffs' continued reference to Mr. Ryan's out-of-context statement in a manner contradicting its intended meaning is unduly prejudicial and threatens to confuse the issues at trial. This will result in a wasteful side-trial on what Mr. Ryan meant. Accordingly, Plaintiffs should be precluded from making any reference to Mr. Ryan's statement.

I. COUNSEL'S STATEMENT IS NOT EVIDENCE

The law is clear that the arguments of counsel are not, themselves, evidence that a trier of fact may consider. *See Dobbs v. Zant*, 506 U.S. 357, 362 (1993) (Scalia, J., concurring); *Darden v. Wainwright*, 477 U.S. 168, 182 (1986); *Thornburg v. Mullin*, 422 F.3d 1113, 1134 (10th Cir. 2005); *Rogers v. Gibson*, 173 F.3d 1278, 1288 n.9 (10th Cir. 1999). The trier of fact is the "sole and exclusive judge[]" of a case's merits, and thus the statements, questions and theories espoused by counsel in opening and closing arguments carry no independent weight. *United States v. Broomfield*, 201 F.3d 1270, 1277 (10th Cir. 2000) ("the statements and arguments of counsel are not to be considered evidence in the case"). This is the rule even when those arguments were made *to the trier of fact as part of the trial*, and it is even more true when a party seeks to inject counsel's arguments to the Court from another hearing. The only exception to

this rule permits consideration of counsel's statements only where it amounts to a deliberate, formal judicial admission or stipulation of fact. *See United States v. Nunez*, 532 F.3d 645, 655 (7th Cir. 2008); *United States v. Abo-Seba*, 267 Fed. App'x 794, 803 (10th Cir. 2008); *United States v. Cortez*, 252 F. App'x 887, 892 (10th Cir. 2007). But, even then, counsel's formal admission "is not itself evidence" but rather simply "has the effect of withdrawing a fact from contention." *Martinez v. Bally's Louis., Inc.*, 244 F.3d 474, 476 (5th Cir. 2001). To this end, counsel may not stipulate *legal conclusions*, and nothing said in argument may be used as independent evidence for a legal proposition. *See Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007); *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988).

In accordance with these well-established rules, Mr. Ryan's statement cannot be considered relevant evidence under Federal Rule of Evidence 402. Moreover, Mr. Ryan's statement is decidedly not an admission that poultry litter has been over-applied in violation of the law. "Judicial admissions are *formal, deliberate* declarations [made] for the purpose of dispensing with proof of formal matters or of facts *about which there is no real dispute*." *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 833 n.4 (10th Cir. 2005) (emphasis added). As such, a judicial admission must unambiguously concede some dispute. *See Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880). Mr. Ryan's statement, however, did not "formally and deliberately" concede any issue in dispute. *See Oscanyan*, 103 U.S. at 263 (holding that a statement does not concede a point "if a doubt exists" as to its meaning); *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 252 (5th Cir. 1990) ("Oral argument . . . does not come within the category of deliberate admissions . . . .") (internal citation omitted). Instead, the statement merely reinforced Defendants' long-standing contention that poultry litter has been applied in the IRW beyond the agronomic rates for phosphorus because such application is expressly authorized and permitted

by the nutrient management plans issued by the States of Oklahoma and Arkansas. *See supra* at 2. Mr. Ryan was pointing out that Oklahoma issues nutrient management plans telling each farmer how much poultry litter to apply to each field, and that these state-issued plans are at war with Oklahoma's position in this litigation. Further, to erase any possible confusion surrounding the statement, Defendants subsequently (and repeatedly) clarified the intended meaning. *See* P.I.T. at 32:25-33:12 (Mar. 12, 2008) (Ex. A); *supra* at 2. That explanation alone quells any claim of a concession. *See Smith v. Argent Mortgage Co.*, 2009 WL 1391550 at *5 (10th Cir. May 18, 2009) ("Where, however, the party making an ostensible judicial admission explains the error in a subsequent pleading or by amendment, the trial court must accord the explanation due weight." (quoting *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir. 1995)).

II. COUNSEL'S STATEMENT SHOULD BE EXCLUDED UNDER RULE 403

Even if Mr. Ryan's statement were somehow relevant evidence, it should nevertheless be excluded because its marginal (if any) probative value is substantially outweighed by the danger it presents of unfair prejudice, confusion and delay. *See* Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

As detailed *supra*, Mr. Ryan's statement does not constitute an admission, concession or stipulation with respect to Plaintiffs' allegations that poultry litter has been over-applied in the IRW in violation of the law. *See supra* at 2. At bottom, Defendants vigorously dispute these allegations. *See id.* At most, Plaintiffs are left to only contrast the *wording* of this one-time, out-of-context, statement with that of Defendants' other, persistent denials of Plaintiffs' claims. *See Seshadri v. Kasraian*, 130 F.3d 798, 801 (7th Cir. 1997); *Bally's of Louis.*, 244 F.3d at 476–77; *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428, 1431-32 (10th Cir. 1990). Thus, even if

deemed relevant, Mr. Ryan's statement provides little to no probative value.

Rather than supply probative value, Plaintiffs' anticipated reference to Mr. Ryan's out-of-context statement at trial will serve only to unfairly prejudice Defendants, confuse the issues in dispute, and cause potential delay. Mr. Ryan's statement is subject to misinterpretation without full discussion of Oklahoma's position that farmers are breaking the law when they follow the directions the State itself provides in the nutrient management plans. This ambiguity alone constitutes grounds for exclusion. *See, e.g., Li v. Canarozzi*, 142 F.3d 83, 87 (2d Cir. 1998) (upholding exclusion of statements that were "too vague to be probative"). Seeking to capitalize upon this ambiguity, Plaintiffs have repeatedly quoted the statement out of context. *See, e.g.*, Dkt. No. 2062 at 18 ¶39; *see supra* at 2-3. Defendants are clearly prejudiced by these out-of-context references. As a result, the proceedings could quite likely devolve into a mini-trial over the meaning of Mr. Ryan's statement. *See, e.g., United States v. Cleveland*, 1997 WL 250050 at *3 (E.D. La. May 12, 1997) ("[L]eaving the [ambiguous] comment in will cause a significant and unnecessary detour in the case . . . ."). Such a result confuses the issues actually in dispute, unnecessarily delays the trial, and should be avoided. *See* Fed. R. Evid. 403; *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1194 (10th Cir. 1997) (affirming exclusion of evidence of "limited" probative value that "could have lead to a side trial that would distract the jury from the main issues in the case"); *United States v. Talamante*, 981 F.2d 1153, 1156 & n.5 (10th Cir. 1992) (supporting exclusion of evidence that would "lead to collateral mini trials").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court exclude any reference to Mr. Ryan's statement.

Respectfully submitted,

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